Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Petroleum dan Kimia v Castrol (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-31 OF 1996
ABDUL KADIR SULAIMAN J
2 APRIL 1997

Labour Law *— Employment — Collective agreement — Interpretation of — Provision 'where a gazetted public holiday falls on off day or rest day, a day off in lieu shall be given' — Whether employer had absolute discretion to substitute public holiday with any other day off in lieu — Whether provision was in contravention of the Employment Act 1955 and thus void, of no effect or illegal — Employment Act 1955 ss 7 & 60D(1)*

The applicant, a trade union, and the respondent entered into a collective agreement ('the agreement') which had been taken cognizance of by the Industrial Court under the Industrial Relations Act 1967. Article 30 of the agreement stated, inter alia, 'where a gazetted public holiday falls on off day or rest day, a day off in lieu shall be given ... .' The respondent did not open for business on Saturdays and Sundays. It had been the practice of the respondent in the past to provide its employees with a day off in lieu on the Friday immediately preceding if Saturday was a public holiday. Saturday, 20 August 1994 was a gazetted public holiday. Following the past practice, Friday, 19 August 1994 would have been a day off for the employees. But the respondent decided to discontinue the practice and instead to grant in lieu of the public holiday, an additional day which would be credited to the employees' individual annual leave entitlement. The applicant, representing the employees, being dissatisfied with the decision of the respondent, referred the matter to the Industrial Relations Department.

After a hearing, the Industrial Court handed down its award ('the impugned award') in favour of the respondent. The court held that by the agreement having been taken cognizance of, it became an award of the court which bound the parties and could not be superseded by the previous practice. It interpreted the words 'a day off in lieu shall be given' contained in art 30 of the agreement to mean a day off to be given by the respondent at its absolute discretion without any obligation to consult the applicant. The applicant applied to the High Court to quash the impugned award.

Held, granting the application:

In giving its interpretation to the provisions contained in art 30 of the agreement, the Industrial Court had overlooked the relevant provisions of the Employment Act 1955 ('the 1955 Act') with regard to collective agreements of this nature. Section 7 of the 1955 Act declares that any term or condition of an agreement, whether such agreement was entered into before or after the coming into force of the Act, which is less favourable to an employee than a term or condition of service

prescribed by the Act, shall be void and of no effect to that extent and the more favourable provisions of the Act shall be substituted therefor.

According to s 60D of the 1955 Act, employees are entitled to a paid holiday on 10 gazetted public holidays. If any of the 10 days falls on a rest day, the working day following immediately the rest day shall be a paid holiday in substitution therefor. Therefore, the respondent had no absolute discretion to substitute the public holiday with any other day off in lieu. Without the agreement of the applicant, the respondent could not unilaterally decide to grant the day off in lieu to the employees on any other day to be credited to the employees' individual annual leave entitlement, being in contravention of the proviso to s 60D(1) of the 1955 Act.

In the light of the relevant provisions of the 1955 Act, the decision of the Industrial Court had become an error of law on the face of the record. No doubt, collective agreements once taken cognizance of by the Industrial Court would bind the parties to the agreement. But no provision contained therein would be binding if it was void, of no effect or illegal being in contravention of the 1955 Act. In the circumstances, this application by the applicant must succeed and the impugned award was quashed (see pp 858D–F and 859C–I).

[Bahasa Malaysia summary

Pemohon, sebuah kesatuan sekerja, dan penentang mengikat suatu perjanjian kolektif ('perjanjian tersebut') yang Mahkamah Perusahaan telah pun mengambil perhatian di bawah Akta Perhubungan Perusahaan 1967. Perkara 30 perjanjian tersebut menyatakan, antara lain, 'di mana cuti am yang diwartakan jatuh pada hari cuti atau hari rehat, sehari kelepasan akan diberikan sebagai ganti ... .' Penentang tidak menjalankan perniagaan pada hari Sabtu dan Ahad. Ia merupakan amalan penentang sebelum ini untuk memperuntukkan sehari cuti kepada pekerja-pekerja sebagai ganti pada hari Jumaat yang mendahului jika hari Sabtu adalah satu cuti am. Hari Sabtu, 20 Ogos 1994 telah diwartakan sebagai cuti am. Menurut amalan yang lepas, hari Jumaat, 19 Ogos 1994 sepatutnya adalah cuti am untuk pekerja-pekerja. Tetapi penentang mengambil keputusan untuk mengabaikan amalan ini dan sebaliknya memberikan sebagai gantinya hari tambahan yang akan dikreditkan ke dalam hak cuti tahunan individu pekerja-pekerja. Pemohon yang mewakili para pekerja, yang tidak berpuas hati dengan keputusan penentang, telah merujuk perkara itu kepada Jabatan Perhubungan Perusahaan.

Selepas pembicaraan, Mahkamah Perusahaan mengumumkan awardnya ('award yang dipersoalkan') memihak kepada penentang. Mahkamah memutuskan bahawa oleh kerana perjanjian tersebut telah pun diambil perhatian, ia telah menjadi satu award mahkamah yang mengikat pihak-pihak dan tidak boleh digantikan oleh amalan terdahulu. Ia mentafsirkan perkataan-perkataan 'sehari cuti sebagai ganti akan diberikan' yang terkandung dalam perkara 30 perjanjian tersebut sebagai bermaksud sehari cuti yang akan diberi oleh

penentang atas budi bicara mutlaknya tanpa sebarang kewajipan untuk berunding dengan pemohon. Pemohon membuat permohonan kepada Mahkamah Tinggi untuk membatalkan award yang dipersoalkan.

Diputuskan, membenarkan permohonan:

Dalam memberikan tafsirannya atas peruntukan yang terkandung dalam perkara 30 perjanjian tersebut, Mahkamah Perusahaan telah tidak mengendahkan peruntukan relevan Akta Pekerjaan 1955 ('Akta 1955') berhubung dengan perjanjian kolektif jenis ini. Seksyen 7 Akta 1955 mengisytiharkan bahawa apa-apa terma atau syarat sesuatu perjanjian, sama ada perjanjian sedemikian diikat sebelum atau selepas Akta 1955 berkuatkuasa, yang kurang menyenangi seorang pekerja berbanding dengan terma atau syarat perkhidmatan yang ditetapkan oleh Akta, adalah terbatal dan tidak berkesan setakat itu dan peruntukan Akta yang lebih menyenangi akan diganti untuknya.

Menurut s 60D Akta 1955, pekerja-pekerja berhak mendapatkan cuti am yang dibayar pada 10 cuti am yang diwartakan. Jika satu daripada 10 hari jatuh pada hari rehat, hari bekerja yang menyusul hari rehat adalah cuti am dibayar sebagai gantinya. Oleh yang demikian, penentang tidak mempunyai budi bicara mutlak untuk menggantikan cuti am dengan mana-mana hari cuti yang lain sebagai ganti. Tanpa persetujuan daripada pemohon, penentang tidak boleh memutuskan secara satu pihak untuk memberikan hari cuti kepada pekerja-pekerja sebagai ganti untuk mana-mana hari lain yang akan dikreditkan ke dalam hak cuti tahunan individu pekerja-pekerja, kerana ia melanggar proviso s 60D(1) Akta 1955.

Memandangkan peruntukan relevan dalam Akta 1955, keputusan Mahkamah Perusahaan telah menjadi satu kesilapan undang-undang pada rekod. Tanpa keraguan, perjanjian kolektif yang telahpun diambil perhatian oleh Mahkamah Perusahaan akan mengikat pihak-pihak kepada perjanjian tersebut. Tetapi tiada peruntukan di dalamnya akan mengikat jika ia adalah terbatal, tidak berkesan atau menyalahi undang-undang kerana melanggar Akta 1955. Dalam keadaan-keadaan begitu, permohonan oleh pemohon harus berjaya dan award yang dipersoalkan dibatalkan (lihat ms 858D–F dan 859C–I).]

Notes

For cases on collective agreement, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 610–611.

Case referred to

Aspdin v Austin (1844) 5 QB 671 (refd)

Legislation referred to

Employment Act 1955 ss 7, 60D(1)
Industrial Relations Act 1967 ss 16, 17, 33(1)

N Mahalingam (*Genga Maha Wong & Co*) for the appellant/applicant.
P Jayasingam (*Albar Zulkifly & Yap*) for the respondent.

Abdul Kadir Sulaiman J: The applicant and the respondent entered into a seventh collective agreement for a period of three years commencing from 1 January 1994. The Industrial Court took cognizance of the agreement under s 16 of the Industrial Relations Act 1967 ('the 1967 Act') in Cognizance No 190/94. Article 30 of the agreement states:

> A The company shall recognize all gazetted Federal Public Holidays. In addition, the company shall recognize in respect of any employees having his normal place of work in a given state or Federal Territory, all gazetted public holidays for such state or Federal Territory.
>
> B Should a gazetted public holiday fall within the period when an employee is on annual leave, the employee shall be given an additional day's leave for such public holidays falling within the period. Such additional day or days shall be taken as an extension of annual leave.
>
> C Where a gazetted public holiday falls on off day or rest day, *a day off in lieu shall be given*. Where, for operational reasons, a day off in lieu cannot be given, payment in lieu in accordance with the provisions of section to 'pay for work on rest days and public holidays' shall be given. (Emphasis added.)

The respondent does not open for business on Saturdays and Sundays and consequently, the employees do not work on those two days in a week. It has been the practice of the respondent in the past in compliance with the provisions identical to the above article in the agreement when implementing the previous collective agreements between the parties to provide its employees with a day off in lieu on the Friday immediately preceding if Saturday was a public holiday. However, if the public holiday fell on a Sunday, the immediate following Monday would be treated as an off day in lieu. Anniversary of the birthday of Prophet Muhammad in 1994, which was a gazetted public holiday, fell on Saturday, 20 August 1994. Following the past practice, Friday, 19 August 1994 would have been a day off for the employees. But by a notice dated 23 June 1994, the respondent decided to discontinue the said practice and instead to grant in lieu of the said public holiday, an additional day which would be credited to the employees' individual annual leave entitlement. The reason given was that this would improve the customer service. Under the circumstances, the employees were required to work on Friday, 19 August 1994.

The applicant, representing the employees, being unhappy with the decision of the respondent, by a letter dated 10 October 1994, referred the matter to the Industrial Relations Department. The respondent, on its part, invoked s 33(1) of the 1967 Act and called upon the Industrial Court to interpret the provisions of art 30 para C of the agreement. The respondent wanted the said provisions to be interpreted as follows:

> Where a public holiday falls on an off day or a rest day, the company *shall substitute the said public holiday with any other day off in lieu* of the said public holiday. The choice of the said day off in lieu shall be *at the absolute discretion of the company*. However, where such substitution is not possible due to operational reasons, the company shall make payment in lieu to the workman, in accordance with arts 20 and 21 of the collective agreement. (Emphasis added.)

After a hearing, the Industrial Court handed down its Award No 56 of 1996 ('the impugned award') concurring with the respondent. The reason being that the agreement itself supersedes any previous practice. The court held that by the agreement having been taken cognizance of, it became an award of the court which binds the parties and cannot, therefore, be superseded by the previous practice. It interprets the words 'a day off in lieu shall be given' contained in the said paragraph of the article to mean a day off to be given by the respondent at its absolute discretion without any obligation to consult the applicant. The court further ruled that if it is otherwise, then it should have been clearly spelt out in the agreement. In support, the words of Lord Denman CJ in *Aspdin v Austin* (1844) 5 QB 671 as follows was cited:

> Where parties have entered into a written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that having expressed some, they have expressed all the conditions by which they intend to be bound under the instrument.

It may well be so as stated by Lord Denman CJ in the case cited. But in the particular instance, in giving its interpretation to the provisions contained in art 30 para C of the agreement, the court has overlooked the relevant provisions of the Employment Act 1955 ('the 1955 Act') with regard to collective agreements of this nature. Section 7 of the 1955 Act declares that any term or condition of an agreement, whether such agreement was entered into before or after the coming into force of the Act, which is less favourable to an employee than a term or condition of service prescribed by the Act, shall be void and of no effect to that extent and the more favourable provisions of the Act shall be substituted therefor. Section 60D of the 1955 Act in as much as it is relevant to the matter, states:

> 60D (1) Every employee shall be entitled to a paid holiday at his ordinary rate of pay on ten gazetted public holidays in any one calendar year, four of which shall be —
> (a) the National Day;
> (b) the Birthday of Yang di-Pertuan Agong;
> (c) the Birthday of the Ruler or the Yang di-Pertua Negeri, as the case may be, of the State in which the employee wholly or mainly works under his contract of service, or the Federal Territory Day, if the employee wholly or mainly works in the Federal Territory; and
> (d) the Workers' Celebration Day:
>
> Provided that if any of the said ten gazetted public holidays falls on a rest day *the working day following immediately thereafter shall be a paid holiday in substitution therefor.*
>
> (1A) The employer shall exhibit conspicuously at the place of employment before the commencement of each calendar year a notice specifying the remaining six gazetted public holidays in respect of which his employees shall be entitled to paid holidays:
>
> Provided that *by agreement between the employer and an employee* any other day or days may be substituted for one or more of the said remaining six gazetted public holidays.

...

(3) (a) Notwithstanding sub-ss (1), (1A) and (1B), any employee may be required by his employer to work on any paid holiday to which he is entitled under the said subsections and in such event he shall, in addition to the holiday pay he is entitled to for that day —

(i) in the case of an employee employed on a monthly, weekly, daily, hourly, or other similar rate of pay, be paid two days' wages at the ordinary rate of pay; or

(ii) in the case of an employee employed on piece rates, be paid twice the ordinary rate per piece,

regardless that the period of work done on that day is less than the normal hours of work. (Emphasis added.)

The essence behind the provisions of s 60D of the 1955 Act is to provide for paid holidays to the employees on 10 days gazetted as public holidays. Four gazetted public holidays are specified as paid holidays for the employees and as to the remaining six gazetted public holidays, parties may agree to substitute them with any other days for the purpose of paid holidays. However, it is provided that if any of the said ten days falls on a rest day, the working day following immediately the rest day shall be a paid holiday in substitution thereof. So, as in this case, where Saturday and Sunday are not working days for the employees of the respondent, if a gazetted public holiday falls on either a Saturday or a Sunday, then a paid holiday for those employees shall be on a Monday which follows immediately the rest day. The respondent here has, therefore, no absolute discretion to substitute the said public holiday with any other day off in lieu, as sought by the respondent and concurred upon by the Industrial Court in the impugned award. In reference to the dispute, in particular between the applicant and the respondent, both parties having accepted the Anniversary of the birthday of Prophet Muhammad, being one of the six unspecified gazetted public holidays, which fell on Saturday, 20 August 1994 to be a public holiday for the employees, it follows that without the agreement of the applicant, the respondent could not unilaterally decide to grant the day off in lieu to the employees on any other day to be credited to the employees' individual annual leave entitlement, being in contravention of the proviso to s 60D(1) of the 1955 Act.

Without the operation of the 1955 Act, the Industrial Court would have been right in construing 'a day off in lieu' found in para C of art 30 of the agreement to mean any day at the absolute discretion of the respondent to choose. But in the light of the relevant provisions of the 1955 Act, the decision of the Industrial Court has become an error of law on the face of the record. No doubt, a collective agreement once taken cognizance of by the Industrial Court under s 16 of the Act would bind the parties to the agreement under s 17 thereof. But no provisions contained therein would be binding if it is void, of no effect or illegal being in contravention of the 1955 Act. In the circumstances, this application by the applicant must succeed and the impugned award is hereby quashed. Costs to the applicant.

Order accordingly.

Reported by Jafisah Jaafar